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case.

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**IN THE
COURT OF APPEALS OF INDIANA**

| | | |
|-----------------------|---|-----------------------|
| STATE OF INDIANA, |) | |
| |) | |
| Appellant-Plaintiff, |) | |
| |) | |
| vs. |) | No. 53A01-0604-CR-141 |
| |) | |
| JOHN FRANKLIN BRYANT, |) | |
| |) | |
| Appellee-Defendant. |) | |

APPEAL FROM THE MONROE CIRCUIT COURT
The Honorable Douglas R. Bridges, Judge
Cause No. 53C05-0404-FD-774

MAY 4, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Plaintiff-Appellant State of Indiana appeals from the grant of Defendant-Appellee John Franklin Bryant's motion for discharge. We reverse and remand for further proceedings.

The State raises a single issue for our review: whether the trial court erred when it granted Bryant's motion for discharge alleging a violation of Indiana Criminal Rule 4.

On September 21, 2004, the State charged Bryant with Count I, Class D felony intimidation; Count II, Class A misdemeanor battery; and with being a habitual offender. The charges were subsequently amended to allege Count I as Class A misdemeanor domestic battery, Count IA as Class D felony battery, and Count II as Class D felony intimidation.

On January 4, 2005, the Monroe Circuit Court set the matter for jury trial on April 14, 2005. On April 8, 2005, however, the trial court granted both defense attorney Clarence Frank's April 5, 2005 motion to withdraw and Bryant's motion for continuance. On April 28, 2005, attorney Stuart Baggerly filed his appearance.

At a pre-trial conference on May 11, 2005, Bryant made an oral motion for a speedy trial pursuant to Indiana Criminal Rule 4(B). The court then scheduled a jury trial for July 18, 2005. On July 14, 2005, Baggerly was discharged and the trial date was vacated pending appointment of new counsel.

On July 21, 2005, the trial court appointed Robert T. Miller and Associates as Bryant's new pauper counsel. Miller filed his appearance on July 25, 2005, and on September 15, 2005, the trial court set jury trial for November 30, 2005.

On October 13, 2005, the trial court granted Miller's motion to withdraw, and on October 17, 2005, the trial court ordered appointment of new pauper counsel, Ronald Chapman. The November 30, 2005 trial date was not changed.

On November 23, 2005, however, the trial court ordered the discharge of Chapman and appointed Thomas Berry as Bryant's pauper counsel. The trial court continued the jury trial, stating it would reset the trial when Berry appeared.

On January 6, 2006, David Colman appeared for Bryant, and on January 9, 2006, the trial court set jury trial for February 1, 2006. On January 27, 2006, Bryant filed his motion for discharge. After a hearing, the trial court granted the motion; however, the court did not state which part of the rule necessitated discharge. The trial court subsequently denied the State's motion to correct error. The State now appeals.

Before addressing the trial courts arguments, we note that Bryant failed to file an appellee's brief. When an appellee fails to submit a brief, we need not undertake the burden of developing an argument for him. *State v. Necessary*, 800 N.E.2d 667, 669 (Ind. Ct. App. 2003). Indiana courts apply a less stringent standard of review with respect to showings of reversible error when an appellee fails to file a brief. *Id.* Hence, we may reverse the trial court if an appellant establishes prima facie error. *Id.* Prima facie error is defined as "at first sight, on first appearance, or on the face of it." *Id.*

The State first argues that discharge is not warranted under Crim.R. 4(B)(1), which provides that if a defendant held in jail or on an indictment or an affidavit moves for an early trial, "he shall be discharged if not brought to trial within seventy (70) calendar days from the date of such motion. . . ." An exception to the rule occurs where a

continuance within the seventy-day period is had on the defendant's motion or the delay is otherwise caused by his act. *Id.* A defendant must object at the earliest opportunity when his trial date is scheduled beyond the limits prescribed by the rule. *Dukes v. State*, 661 N.E.2d 1263, 1265 (Ind. Ct. App. 1996). This requirement is enforced to enable the trial court to reset the trial date within the proper time period. *Id.* Failure to object is regarded as acquiescence to the new trial date and waiver of the right to speedy trial. *Id.*

Here, Bryant requested a speedy trial pursuant to Crim.R. 4(B)(1) on May 11, 2005, and the trial court set the trial date for July 18, 2005, a date that was within the seventy-day period prescribed by the rule. On July 14, 2005, Bryant's attorney withdrew, and the trial court informed Bryant that his July 18, 2005 trial would be postponed and that his trial would not occur until after the expiration of the seventy-day period. Bryant specifically acquiesced to this extension, saying "That's fine, your honor." This acquiescence resulted in waiver of his right to speedy trial and discharge under Crim.R. 4(B)(1) is unwarranted.

The State also argues that discharge is not warranted under Crim.R. 4(C). The rule provides, with certain exceptions, for the discharge of a defendant held to answer for a criminal charge for a period in aggregate of more than one year. *See State v. McGuire*, 754 N.E.2d 639, 642 (Ind. Ct. App. 2001), *trans. denied*. Because the State has an affirmative duty to try the defendant within one year, the defendant is under no obligation to remind the State of its duty. *Rhoton v. State*, 575 N.E.2d 1006, 1010 (Ind. Ct. App. 1991), *trans. denied*. However, a defendant has a duty to alert the court when a trial date has been scheduled beyond the one-year limit set forth in the rule. *Id.* (citing *Huffman v.*

State, 502 N.E.2d 906 (Ind. 1987)). If a defendant remains silent while the court schedules a trial beyond the allowable date, then his action estops him from enforcing any right of discharge. *Id.* (citing *Utterback v. State*, 261 Ind. 685, 310 N.E.2d 552 (1974)). Moreover, the time for trial is extended for delays caused by the defendant's own acts or continuances had on the defendant's motion. *Cook v. State*, 810 N.E.2d 1064, 1066-67 (Ind. 2004). Thus, if a defendant "seeks or acquiesces in any delay which results in a later trial date, the time limitations of the rule are also extended by the length of those delays." *Wooley v. State*, 716 N.E.2d 919, 924 (Ind. 1999). Furthermore, delays caused by the withdrawal of a defendant's attorney do not accrue against the rule period. *Isaacs v. State*, 673 N.E.2d 757, 763 (Ind. 1996).

In the present case, charges were filed against Bryant on September 21, 2004. Barring any delays attributable to Bryant, the State was obligated under Crim.R. 4(C) to bring him to trial by September 21, 2005. On September 15, 2005, after various delays caused by withdrawal or discharge of Bryant's appointed attorneys, the trial court set the case for jury trial on November 30, 2005. Bryant did not object to this trial date, and he is estopped from basing a claim for discharge based upon the November 30, 2005 date.

On November 23, 2005, the trial court was forced to discharge yet another of Bryant's attorneys because of a conflict of interest. Thus, a new period of delay attributable to Bryant began to run. When a new attorney was appointed to represent Bryant, the court immediately scheduled a trial for February 1, 2006. However, before the trial, Bryant's new attorney filed the motion for discharge.

Because the delays resulting in a February 1, 2006 trial date were attributable to Bryant, there was no violation of Crim.R. 4(C). Accordingly, the trial court erred in granting Bryant's motion for discharge.

We reverse and remand with instructions that the trial court vacate its order of discharge.

FRIEDLANDER, J., and RILEY, J., concur.